

Exhibit A

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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 IN RE: UBER TECHNOLOGIES, INC.,
16 PASSENGER SEXUAL ASSAULT
17 LITIGATION

18 This Document Relates to:
19 ALL ACTIONS

Case No. 3:23-md-03084-CRB

**DEFENDANT UBER TECHNOLOGIES,
INC., RASIER, LLC, AND RASIER-CA,
LLC'S NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

Date:
Time:
Place:

NOTICE OF MOTION AND MOTION FOR RECONSIDERATION

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Civil Local Rule 7-9 and the Court's Order Granting Defendants' Motion for Leave to File Motion for Reconsideration, Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC (collectively, "Uber") will and hereby do move the Court to reconsider a portion of its April 24, 2025 Minute Order (Dkt. 2855) (the "Order"). Specifically, Uber seeks reconsideration of the portion of the Order finding Uber waived the attorney-client privilege or work product protection for a category of documents it originally designated as privileged and then de-designated when this Court was overseeing privilege disputes. Order at p. 1.

The Motion for Reconsideration (the "Motion") is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, and the pleadings and papers on file herein.

DATED: July 9, 2025

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

The attorney-client privilege and work product protection are bedrock principles of American jurisprudence and are core to fair representation in the legal system. At the April 24, 2025 Status Conference (the “Status Conference”), the Court *sua sponte* questioned whether Uber waived these sacrosanct protections for certain unidentified documents it de-designated during the time this Court was overseeing privilege disputes and found that Uber had in fact waived such protections. In so finding, the Court did not follow the procedure for submitting clawback disputes to the Court established by Pretrial Order 14. The Court also made its *sua sponte* ruling without adequate notice to Uber and/or a full and fair opportunity to be heard on this consequential issue. As a result, Uber was deprived of its attorney-client privilege and work-product protection without consideration of the factual circumstances surrounding the de-designation and clawback of the unidentified documents and without the opportunity to develop and brief its legal arguments. There are unique sets of facts that warrant clawing back certain documents that may have been previously de-designated during the earlier, expedited review process. Yet, Uber did not have an opportunity to explain those facts before the Court categorically ruled. Therefore, Uber respectfully requests this Court reconsider and vacate the relevant portion of its Order. Additionally, Uber maintains that, if the Court grants reconsideration and vacates the relevant portion of the Order, Special Master Barbara Jones should address all privilege clawback disputes in accordance with Judge Breyer’s Order appointing Judge Jones as Special Master.

BACKGROUND

On April 21, 2025, the parties filed a Joint Status Report in advance of the April 24, 2025 Discovery Status Conference. Joint Status Report (Dkt. 2823). Among other discovery issues addressed by the parties, Plaintiffs raised the issue of the “Clawback Procedure” and their view that Uber was using an “improper process” for clawbacks. *Id.* at 2–4. Plaintiffs argued Uber’s clawbacks were “improperly timed” and did “not provide requisite information for Plaintiffs to assess and potentially challenge the clawback.” *Id.* at 3. Plaintiffs further argued that Uber had clawed back “at least 30 documents” for which it had previously withdrawn its privilege assertions. *Id.* Plaintiffs asked the Court to set an April 28 deadline to submit any clawback disputes to the Court. *Id.*

1 In response, Uber pointed out in the Joint Status Report that current privilege disputes,
 2 including disputes over clawed back documents, should be submitted to Special Master Jones. *Id.* Uber
 3 also disagreed with Plaintiffs’ characterization of Uber’s clawback efforts and explained that it
 4 complied with Pretrial Orders 14 and 16. *Id.* at 4. Finally, Uber explained that it was conferring with
 5 Plaintiffs to address their concerns and was “preparing an omnibus list of all documents clawed back
 6 to date and updated privilege log entries corresponding to the documents, as Plaintiffs requested.” *Id.*
 7 Nowhere in the Joint Status Report did Plaintiffs argue that Uber had waived its ability to claw back
 8 privileged documents.

9 Importantly, in Uber’s production of documents to Plaintiffs, Uber has consistently represented
 10 that the production was “not intended to, and does not, waive any applicable privilege or other legal
 11 basis under which information may be protected from disclosure.” *See, e.g.,* Jan. 10, 2025
 12 Correspondence to Plaintiffs’ Counsel. Plaintiffs received multiple productions under this reservation
 13 of rights without objection.

14 On April 24, 2025, this Court held a Discovery Status Conference to address the issues raised
 15 by the parties in the Joint Status Report. April 24, 2025 Discovery Status Conference Tr. (Ex. B). At
 16 the hearing, the Court agreed with Uber that clawback disputes “ought to be addressed by Special
 17 Master Barbara Jones”; however, the Court took issue with “allowing clawback notices concerning
 18 documents that were de-designated ... before Judge Jones was appointed special master.” *Id.* at 9:1–
 19 8. The Court went on to find “those de-designation decisions to be waiver of ... the privilege
 20 assertion.” *Id.* at 9:18–19. Specifically, the Court found, “[T]hose privilege assertions are waived and
 21 they should not be part of ... new clawback notices that are submitted to Judge Jones.” *Id.* at 10:4–10.

22 After the Court’s ruling, Uber responded that due to the volume of documents Uber re-
 23 viewed pursuant to the Court’s prior order and in light of the compressed timeframe in which Uber
 24 had to conduct the re-review, “there may be cases where we believe clawback is appropriate and
 25 supportable.” *Id.* at 10:21–11:11. The Court then stated it construed Uber’s explanation as “a motion
 26 for reconsideration based on newly discovered evidence,” which would be submitted to this Court
 27 because it ordered the re-review. *Id.* at 12:10–12:13. The Court, however, acknowledged that it “would

1 be within [Judge Jones’s] purview to address new privilege log disputes that couldn’t have been raised
 2 in front of [the Court].” *Id.* at 12:13–15. Uber clarified that it was not “suggesting we take a document
 3 the Court has specifically ruled on and redoing that document.” *Id.* at 13:17–13:20. The Court,
 4 nevertheless, found, “Even if [it] didn’t adjudicate a particular document,” allowing clawback of
 5 documents that were de-designated when the Court was overseeing privilege disputes would be
 6 revising “that prior corpus of ... documents that we worked through over the fall.” *Id.* at 14:9–14:12.

7 After the Status Conference, the Court entered the Order, which reiterated its oral order during
 8 the hearing. The Order specifically states, “The merits of privilege clawback disputes are a matter to
 9 be addressed to Special Master Jones. But as a general matter, Uber has waived the right to claw back
 10 documents that it originally designated as privileged and then de-designated as part of the privilege
 11 dispute resolution process overseen by Judge Cisneros.” Order at 1 (Dkt. 2855).

12 ARGUMENT

13 Federal Rule of Civil Procedure 54(b) provides that interlocutory orders “may be revised at
 14 any time before entry of a judgment adjudicating all the claims.” Indeed, Local Rule 7-9(b)(1) allows
 15 a party to seek reconsideration where “a material difference in fact or law exists from that which was
 16 presented to the Court before entry of the interlocutory order for which reconsideration is sought.”

17 A party seeking reconsideration of a *judgment* under Federal Rule of Civil Procedure 59(e)
 18 must show “newly discovered evidence, [] clear error, or ... an intervening change in the controlling
 19 law.” *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). However, “when
 20 a district court issues ‘an *interlocutory order*, the district court has plenary power over it and this
 21 power to reconsider, revise, alter or amend the interlocutory order is not subject to the limitations of
 22 Rule 59.’” *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001) (quoting
 23 *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1315 (11th Cir. 2000)) (emphasis added).
 24 Accordingly, this Court “possesses the inherent procedural power to reconsider, rescind, or modify
 25 [its] interlocutory order *for cause seen by it to be sufficient*.” *Hartzell v. Marana Unified School Dist.*,
 26 130 F.4th 722, 741 (9th Cir. 2025) (emphasis added). Respectfully, sufficient cause exists for the Court
 27 to reconsider its Order.

A. The Required Procedures for Addressing Clawback Disputes Were Not Followed.

Federal Rule of Civil Procedure 72(a) requires that “[w]hen a pretrial matter not dispositive of party’s claim is referred to a magistrate judge to hear and decide, *the magistrate judge must promptly conduct the required proceedings.*” (Emphasis added).

Here the applicable clawback procedure originates from the Court’s Pretrial Order 14 (“PTO 14”). *Northwest Acceptance Corp. v. Lynwood Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (“A pretrial order ... controls the subsequent course of action in the litigation.”) (quotation omitted). PTO 14 prescribes a procedure by which the producing party may notify the receiving party that it produced a document for which it asserts privilege. PTO 14 (Dkt. 396), at p. 2. The receiving party then can contest the assertion of privilege by providing a written “Notice of Clawback Challenge.” *Id.* The parties then go through a conferral period. If the conferral does not resolve the dispute, the parties are required to submit the issue to the Court by filing a “joint letter brief.” *Id.* at 3.

This process simply did not occur here. Instead of a joint letter brief, the parties filed a Joint Status Report addressing within the ten page limit the status of eight different discovery disputes—none of which included a challenge to any particular claw back document. Although Plaintiffs did raise issues regarding clawback *procedures*, Plaintiff made no substantive challenge to documents Uber believed were subject claw back and made no request for the Court to make a finding of waiver. Indeed, Plaintiffs argued they did not have the “requisite information ... to assess and potentially challenge the clawback.” Joint Status Report (Dkt. 2823) at 3. Plaintiffs never mentioned the notion of waiver—neither in the Joint Status Report nor at the Status Conference. Nevertheless, the Court found Uber’s de-designation decisions constituted a waiver of its attorney-client or work-product privilege before Uber was given an opportunity to argue against waiver. Ex. B at 9:18–19. Respectfully, this is contrary to how the agreed-upon pretrial order contemplated that such disputes would be submitted to the Court and resolved.

B. The Court Improperly Raised and Ruled on Privilege Waiver *Sua Sponte*.

To allow litigants the full and fair opportunity to be heard, it is generally disfavored for courts to raise issues *sua sponte*. *See, e.g., Lewis v. Woodford*, Case No. CIV–S–02–0013 FCD GGH DP,

2007 WL 196635, at *20 n.13 (E.D. Cal. Jan. 23, 2007) (“[I]t is generally inappropriate for judicial officers to raise issues sua sponte.”). “There are, however, several respects in which the Federal Rules allow the district court, *with appropriate notice*, to raise issues *sua sponte*.” *Jones v. L.A. Central Plaza LLC*, 74 F.4th 1053, 1057 (9th Cir. 2023) (emphasis added). Further, “[a] court *may only* grant a motion *sua sponte* if all parties have a full opportunity to address the issue.” *Mead Reinsurance v. Granite State Ins. Co.*, 873 F.2d 1185, 1189 (9th Cir. 1988) (emphasis added); *see also Heinz v. C.I.R.*, 770 F.2d 874, 876 (9th Cir. 1985) (reversing the tax court’s *sua sponte* ruling where the taxpayers “were not given a ‘full and fair opportunity to ventilate the issues’”). This is because “[i]n our adversarial system of adjudication, we follow the principle of party presentation.” *United States v. Sinneng-Smith*, 590 U.S. 371, 375 (2020). At the very least, “[g]iven the due process and fairness concerns presented, a district court generally must provide the parties with adequate notice that it is contemplating invoking a particular procedural device *sua sponte*.” *Jones*, 74 F.4th at 1060.

Due process must be carefully considered before a party can be said to have waived attorney-client privilege. “[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges.” *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir.1997). Indeed, “[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Consequently, “[w]hether express or implied, the scope of a waiver must be *narrowly construed* and ‘fit within the confines of the waiver.’” *Garcia v. Progressive Choice Ins. Co.*, 2012 WL 3113172, at *3 (S.D. Cal. July 30, 2012) (quotation omitted) (emphasis added).

Further, waiver of privilege is inappropriate for a blanket rule, but rather should be analyzed in a fact-specific manner. Indeed, “[w]hether a privilege has been waived is a mixed question of fact and law.” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (emphasis added). Accordingly, “waiver of the attorney-client privilege favors a case-by-case determination of waiver based on a consideration of all the circumstances.” *Eureka Financial Corp. v. Hartford Acc. and Indem. Co.*, 136 F.R.D. 179, 184 (E.D. Cal. 1991) (citing *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329 (N.D. Cal. 1985)).

1 This Court did not have the opportunity to consider the specific factual circumstances
 2 concerning Uber’s de-designations or clawback of certain documents. In fact, the documents subject
 3 to waiver pursuant to the Order were not even specifically identified at the Status Conference or in the
 4 Order itself. Nor has Uber had the opportunity to develop and brief legal arguments that its de-
 5 designations do not constitute waiver. The Court indicated its position concerning waiver before Uber
 6 had an opportunity to speak about the topic during the hearing. *See* Ex. B at 9:18–19. And after the
 7 Court stated its position, Uber was only permitted to make spontaneous and impromptu arguments
 8 supporting its privilege claim.

9 “The purpose of notice under the Due Process Clause is to apprise the affected individual of,
 10 and permit adequate preparation for, an impending ‘hearing.’ ... Without notice, ‘[the] right to be
 11 heard has little reality or worth.’” *Wright v. Beck*, 981 F.3d 719, 727 (9th Cir. 2020). Uber neither had
 12 notice that waiver of its privilege claims would be raised at the Status Conference nor a fair opportunity
 13 to address the issue. In short, Uber did not have the “full opportunity to address the issue” necessary
 14 for the Court to raise and rule on waiver of the attorney-client privilege and attorney work-product
 15 protection *sua sponte*.

16 To the contrary, the Order, which finds a blanket waiver of an unidentified group of at least 30
 17 documents, stripped Uber of the opportunity to inform the Court of the particular circumstances that
 18 Uber believes entitle it to assert attorney-client privilege over certain documents it de-designated.
 19 Uber should be allowed such an opportunity, as envisioned by pretrial orders, the case law, and due
 20 process.

21 **C. The Facts and Law Support Claw Back of Certain De-Designated Documents.**

22 Because the Court ruled on waiver without the benefit of briefing, the Court was not able to
 23 consider the unique factual circumstances and legal reasons that necessitated the claw back of certain
 24 documents in this case. PTO 14 allows Uber to claw back the production of privileged documents
 25 regardless of whether the production was inadvertent. Federal Rule of Evidence 502(b) sets a “default”
 26 procedure that only allows a party to claw back certain inadvertent disclosures. Rule 502(d), however,
 27 allows the court to “order that the privilege or protection is not waived by disclosure connected with

the litigation pending before the court.” In other words, Rule 502(d) orders can “supplant[] the default procedures set forth in Rule 502(b).” *Great-West Life & Annuity Ins. Co. v. American Economy Ins. Co.*, No. 2:11-cv-02082-APG-CWH, 2013 WL 5332410, at *11 (D. Nev. Sept. 23, 2013) (finding Rule 502(d) order supplanted Rule 502(b) where “it outline[d] specific action required from the receiving party when it receive[d] information subject to a claim of privilege after inadvertent production.”). The Advisory Committees Notes further explain, “[T]he court order may provide for return of documents without waiver *irrespective of the care taken by the disclosing party.*” Fed. R. Evid. 502, Advisory Committee’s Note to subdivision (d) (emphasis added). Indeed, “Rule 502(d) permits courts to enter orders that provide that a disclosure does not constitute a waiver—*regardless of the actions taken by the producing party*” and “avoid any question about whether [it] was inadvertent.” The Sedona Conference, *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 104 (2016) (emphasis added).

Here, PTO 14 invokes Rule 502(d) to supplant the default procedures in Rule 502(b). Specifically, it provides, “Pursuant to Federal Rule of Evidence 502(d), the production of any privileged or otherwise protected or exempted information in this case shall not be deemed a waiver or impairment of any claim of privilege or protection in this case.” PTO 14 ¶ 2. By its plain language, the non-waiver provision does not require inadvertence. Further, PTO 14 provides a procedure to claw back documents that have “been produced for which the Producing Party asserts privilege and/or other protection,” regardless of whether such production was inadvertent. *Id.* at ¶ 4. Several courts have found similar orders pursuant to Rule 502(d) “allow[] a party to claw back privileged materials *without regard to whether the disclosure was inadvertent.*” *GXO Logistics Supply Chain, Inc. v. Young Living Essential Oils, LC*, 2024 WL 4960008, at *4 (N.D. Miss. Dec. 3, 2024) (collecting cases) (emphasis added).

Even so, Uber’s de-designation of certain documents was inadvertent under the circumstances, regardless of the fact that attorneys had reviewed the documents prior to de-designation. “An ‘inadvertent disclosure’ is simply where the work-product protected document was produced as the result of a mistake.” *B&G Foods North America, Inc. v. Embry*, 2024 WL 922900, at *2 (E.D. Cal.

March 4, 2024). “[A] document may be produced inadvertently even after review and redaction.” *In re Zetia (Ezetimibe) Antitrust Litig.*, MDL No. 2:18md2836, 2019 WL 6122012, at *7 (E.D. Va. July 16, 2019) (collecting cases). This is because “the ‘inadvertence’ requirement of Rule 502(b) was not designed to turn on fine distinctions based on the nature of the mistake to determine whether the particular type of mistaken disclosure qualifie[s] for protection from waiver.” *Datel Holdings Ltd. v. Microsoft Corp.*, Case No. C–09–05535 EDL, 2011 WL 866993, at *3 (N.D. Cal. March 11, 2011). Therefore, an intentional production of documents is an inadvertent disclosure if it is the result of a mistake. *Id.* This comports with the purpose of Rule 502(b). “[T]he point of Rule 502(b) is to protect clients’ confidences from their lawyers’ human errors.” *Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F.3d 397, 406 (7th Cir. 2018). As one court explained:

Concluding that a lawyer’s mistake never qualifies as inadvertent disclosure under Rule 502(b) would gut that rule like a fish. It would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege.

Amobi v. District of Columbia Dept. of Corrections, 262 F.R.D. 45, 54 (D.D.C. 2009). This is particularly true where, as here, “[s]uch errors are, of course, inevitable in complex litigation involving the production of tens of thousands of documents.” *BNP Paribas Mortg. Corp. v. Bank of America N.A.*, Nos. 09 Civ. 9783(RWS), 09 Civ. 9784(RWS), , at *8 (S.D.N.Y. May 21, 2013) (quotation omitted). As such, “Courts have routinely found that where a large number of documents are involved, there is more likely to be an inadvertent disclosure rather than a knowing waiver.” *Baker’s Aid v. Hussmann Foodservice Co.*, No. 87 Civ. 0937, , at *5 (E.D.N.Y. Dec. 19, 1988).

Indeed, under similar circumstances, Judge Thomas Hixson of this District found that Apple inadvertently disclosed and was entitled to clawback two documents it de-designated following a re-review process because:

Epic cites no authority for the proposition that inadvertence does not include an intentional but mistaken decision by a human document reviewer. The question, after all, is whether Apple deliberately produced a document, not whether one particular document reviewer deliberately decided these documents should have been redacted rather than withheld in full. Apple used a large team of reviewers to make privilege calls on large numbers of documents, and a mistake does not mean that the company deliberately produced the document.

1 *Epic Games, Inc. v. Apple, Inc.*, Case No. 20-cv-05640-YGR (TSH), 2025 U.S. Dist. LEXIS 34007
2 (N.D. Cal. February 25, 2025).

3 Uber has produced approximately 1.5 million documents in this litigation. Due to the large
4 number of documents and compressed timeline for review, certain documents were produced as a
5 result of the mistakes of reviewing attorneys who had an incomplete and/or incorrect understanding
6 of the documents. Uber did not intend to produce privileged documents and waive its privilege. Uber
7 should have the opportunity to explain on a document-by-document basis the factual circumstances
8 and applicable law supporting its clawbacks, as contemplated in PTO 14.

9 **D. Special Master Jones Should Decide Whether Uber Waived Privilege for Any**
10 **Documents.**

11 If this Court grants Uber’s Motion, Uber maintains its position that all clawback disputes
12 should be referred to Special Master Jones, including those concerning documents that were de-
13 designated when this Court was overseeing privilege disputes. Judge Breyer’s Order Appointing Judge
14 Barbara Jones as Special Master provides that she “shall assist the Court with all disputes relating to
15 privilege logs and the assertion of attorney client and work product privileges in this MDL.” Order
16 Appointing Judge Barbara Jones as Special Master (Dkt. 2289) ¶ 6. As the Court itself recognized,
17 “the merits of privilege clawback disputes are a matter to be addressed to Special Master Jones.” Order
18 (Dkt. 2855) at 1. Indeed, it “would be within [Judge Jones’s] purview to address new privilege log
19 disputes that couldn’t have been raised in front of” the Court. Ex. B at 12:13–12:15. Accordingly, the
20 relevant timing for clawback disputes properly within Special Master Jones’s purview is not when the
21 inadvertent de-designation occurred, but rather, when Uber discovered the inadvertent de-designation.
22 Only after discovery of the inadvertent disclosure could Uber raise the clawback issue. Thus, the
23 current clawback dispute is a new privilege dispute and, thus, should be addressed by Special Master
24 Jones.

25 Special Master Jones is already assigned to resolve privilege disputes and she should decide
26 whether Uber has met its burden to establish privilege or has waived privilege for any particular
27 documents. Indeed, Special Master Jones has already ruled on approximately 1,100 privilege
28

challenges and is very familiar with the specific issues related to privilege in this case. In fact, she has already entered an order setting the timeline and procedures for addressing clawback privilege disputes, and several sets of claw back documents have already been submitted to her for in-camera review. (Dkt. 2933). Several other sets of privilege challenges, including challenges to clawbacks, are scheduled for submission in the next several weeks. For efficiency and pursuant to Judge Breyer's Order, Special Master Jones should hear all privilege clawback disputes.

CONCLUSION

For the reasons set forth above, Uber requests the Court grant Uber's Motion for Reconsideration. Uber further requests the Court vacate its April 24, 2025 Order to the extent it holds Uber waived its attorney-client and work-product privilege for documents it de-designated and refer all disputes arising out of clawed back documents to Special Master Jones.

Alternatively, even if the Court does not refer this clawback dispute to Special Master Jones, Uber respectfully requests that the Court vacate the Order and provide an opportunity to present its legal and factual arguments supporting clawback for specific documents that Plaintiffs claim are subject to waiver due to de-designation when this Court was overseeing privilege disputes. For any documents the Court determines Uber may clawback, Uber respectfully requests that Special Master Jones decide the merits of the privilege claims.

DATED: July 9, 2025

Respectfully submitted,

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